

COA No.
466414

No. 89603-8

SUPREME COURT OF THE STATE OF WASHINGTON

**WILLIAM E. WALL, ESTATE OF JAMES H. JACK by and
through its Personal Representatives, SHARON A. JACK and
LINDA R. LEIBICH,**

Appellants,

v.

**THE STATE OF WASHINGTON acting by and through the
WASHINGTON STATE LEGISLATURE and JAMES McINTYRE,
Treasurer of the State of Washington; BRIAN SONTAG, Auditor of
the State of Washington; and BRAD FLAHERTY, Director of the
Dept. of Revenue, State of Washington,**

Respondents.

BRIEF OF APPELLANTS

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A. IDENTITY OF APPELLANTS

Appellant, William E. Wall (Wall), is a citizen of the State of Washington and a taxpayer. Appellant, Estate of James H. Jack by and through its Personal Representatives, Sharon A. Jack and Linda R. Leibich, is an estate taxpayer, having paid Washington State Estate Tax.

B. INTRODUCTION

Appellants seek direct review of the Order on Motions for Summary Judgment and Plaintiffs' Motion for Reconsideration made and entered on November 8, 2013, by Erik D. Price, Judge of the Superior Court for Thurston County.

The Order dismissed Appellants' constitutional challenge to diversion of estate tax funds from the Education Legacy Trust Account to the State General Fund as part of a budget and appropriations legislation.

Respondents transferred \$67 million from the Education Legacy Trust Account to the General Fund in violation of the Washington State Constitution as more fully set forth herein.

C. ASSIGNMENTS OF ERROR

1. Did the trial court err in ruling that the Legislature's diversion of \$67 million from the Education Legacy Trust Account to the State

General Fund in 2009 was permissible under both Article VII, Section 5 and Article II, Section 9 of the Washington Constitution?

2. Did the trial court err in ruling that while money cannot be diverted from the object of the estate tax under Article VII, Section 5 of the Washington Constitution, the Legislature can change the object of the tax by an amendment to budget and appropriations legislation?

3. Did the trial court err in ruling that a statutorily based tax, such as the estate tax should be distinguished from a constitutionally created tax for purposes of avoiding the plain language of Article VII, Section 5 of the Washington Constitution?

4. Did the trial court err in ruling that the 2008 amendment to RCW 83.100.230 in the budget and appropriations legislative process satisfies the “state distinctly” requirement of Article VII, Section 5 of the Washington Constitution?

5. Did the trial court err in ruling that the Legislature’s explicit statement of intent in enacting the estate tax to provide education funding can be meaningfully broadened to embrace general fund programs?

6. Did the trial court err in holding that the 2008 amendment to RCW 83.100.230 by a last minute provision buried in a budget and

appropriations bill did not violate Article VII, Section 5 of the Washington Constitution which provides in part that “every law imposing a tax shall *state distinctly* the object of the same *to which only it shall be applied*”? (Emphasis added.)

7. Did the trial court err in ruling that the Legislature had plenary power to legislatively divert estate tax proceeds to the state’s General Fund?

8. Did the trial court err in ruling that the authority of the 2008 Legislature to change the act of a previous legislature would be weakened by allowing plaintiffs’ constitutional challenge to the action of the Legislature in purportedly changing the object of the estate tax in budget and appropriations legislation?

9. Did the trial court err in ruling that the 2008 amendment of RCW 83.200.230, purportedly changing the object of the estate tax, was not substantive legislation placed in a budget and appropriations bill in violation of Article II, Section 19 of the Washington Constitution?

10. Did the trial court err in its analysis of Article II, Section 19 of the Washington Constitution by substantially deferring to the actions of the 2008 Legislature in amending the object of the estate tax in a budget bill

where the object of the estate tax had already been established in a separate substantive bill in 2005.

D. STATEMENT OF THE CASE

In response to the Washington State Supreme Court decision in *Hemphill v. Dept. of Revenue*, 153 Wn.2d 544, 105 P.3d 391 (2005), the Legislature in 2005 enacted a stand-alone estate tax, codified as RCW Ch. 83.100. The new tax, as with all tax legislation, was required by Article VII, Section 5 of the State Constitution to “state distinctly the object” of the tax, which was declared to “provide funding for education,” Laws of 2005, Ch. 516, Section 1. The Legislation was clear that all proceeds from this new estate tax “*must* be deposited” into the Education Legacy Trust Account, and withdrawals from it “*only* for support of the common schools, and for expanding access to higher education . . . and other educational improvement efforts.” RCW 83.100.220 and .230. (Emphasis supplied.)

In 2008, the Legislature, toward the end of the legislative session, in an addition to budget and appropriations legislation, added the following sentence to RCW 83.100.230:

During the 2007-2009 fiscal biennium, monies in the account may also be transferred into the State General Fund. (CP 190).

In 2009, the Legislature authorized and directed transfer of \$67 million from the Education Legacy Trust Account to the State General Fund. (CP 192-197.)

This state has a history with the estate or so-called “death tax.” In 1980, the voters acting through the initiative process, abolished estate taxes, save for the off-setting credit permitted under federal law.

Designating education as the sole beneficiary of the new estate tax, provided a lofty and noble reason to once again subject citizens to an estate tax. It is highly unlikely that a tax measure of such public import would have been enacted without extensive scrutiny and discussion had it been presented as a way to add tax revenues to the General Fund.

Appellant taxpayers, on behalf of themselves and as representatives of similarly situated taxpayers, sought a declaratory judgment challenging the constitutionality of budget and appropriations legislation which moved \$67 million from the Education Legacy Trust Account to the State General Fund. Appellants contend the legislation and transfer violated Article VII, Section 5 of the Washington State Constitution by diverting estate tax funds from its stated object. All estate tax revenues were to be dedicated to educational funding through the Education Legacy Trust Account. Further,

appellants contend the actions of the Legislature were an unconstitutional violation of Article II, Section 19 of the Washington State Constitution by attempting to temporarily change the object of the estate tax by budget and appropriations legislation.

On cross motions for summary judgment, the trial court entered orders on July 30, 2013 (CP 150-154) and November 8, 2013 (CP 313-317) dismissing appellants' cause of action. A verbatim transcript of the court's initial ruling (June 7, 2013) has been filed in this proceeding. Following oral argument on appellants' motion for reconsideration, on September 9, 2013, the court issued a letter opinion dated October 2, 2013. (CP 305-312.) The Final Order on Motions for Summary Judgment and Plaintiffs' Motion for Reconsideration entered November 8, 2013. (CP 313-317.)

In its "preliminary" ruling of July 30, 2013 (CP 150-154) the court held that Article VII, Section 5 of the Washington Constitution applies to estate taxes. Additionally, the court ruled that notwithstanding Article VII, Section 5, prohibiting diversion of estate tax money from the object of the tax, the Legislature could add a new "object of the tax" through Budget & Appropriations Legislation. (CP 152.)

In its Letter Opinion (CP 305-312) the trial court distinguished constitutionally-based taxes from statutorily-based taxes. According to the court's analysis, if a particular tax was assigned to a constitutionally created destination, the Legislature's ability to redirect those proceeds would be much more limited than in the present case where the Legislature, not the State Constitution, created the object of the estate tax. No authority is cited for this heretofore unknown Constitutional interpretation.

Adopting this distinction and applying the heavy burden of overcoming the presumption of constitutionality of a statute, the trial court deemed plaintiffs' case authority "less relevant." (CP 307.)

Addressing Article II, Section 19 of the Washington Constitution, the court observed that inclusion of a provision temporarily changing the object of the estate tax "deep within an appropriations bill would appear to be a budgetary tactic rooted in fiscal desperation, rather than sound legislative policy making." (CP 311.) Nevertheless, the trial court gave substantial deference to the Legislature and concluded the action of the Legislature satisfied Article II, Section 19.

In short, the trial court ruled that neither Article VII, Section 5 nor Article II, Section 19 of the Washington Constitution were violated when the

distinctly stated purpose and object of the estate tax was temporarily changed by last minute budget and appropriations legislation allowing diversion of \$67 million from the Education Legacy Trust account to the State General Fund.

E. ARGUMENT

1. ***Standard of Review.*** An appellate court review of a summary judgment order is *de novo*, engaging in the same inquiry as the trial court. Summary judgment should be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Weslo, Inc.*, 79 Wn.App. 829, 906 P.2d 336 (1995). Where the parties do not dispute the facts, and the sole issue is the proper interpretation of the law, review is *de novo*. *Superior Asphalt & Concrete Co. v. Dept. of Labor & Industries*, 84 Wn.App. 401, 929 P.2d 1120 (1996).

2. ***Undisputed Facts.*** This case presents the following undisputed facts:

a. The Legislature enacted Laws of 2005, Ch. 516, codified in RCW 83.100, and Section 1 of that Act reads as follows:

The legislature recognizes that on February 3, 2005, the Washington State Supreme Court decided in *Estate of*

Hemphill v. Dep't of Rev., Docket No. 74974-4, that Washington's estate tax is tied to the current federal Internal Revenue Code. The legislature finds that the revenue loss resulting from the *Hemphill* decision will severely affect the legislature's ability to fund programs vital to the peace, health, safety, and support of the citizens of this State. The legislature intends to address the adverse fiscal impact of the *Hemphill* decision and provide funding for education by creating a stand-alone state estate tax. (Defendants' Answer to First Amended Complaint, ¶3.2; CP 328.)

b. The Legislature stated in Laws of 2005, Ch. 516, Section 1, an intent to provide funding for education. (Defendants' Answer to First Amended Complaint, ¶ 3.3; CP 329.)

c. The Laws of 2005 also added RCW 83.100.220, which provides:

All receipts from taxes, penalties, interest, and fees collected under this chapter must be deposited into the Education Legacy Trust Account.

d. The Laws of 2005 also added RCW 83.100.230 which provided:

The Education Legacy Trust Account is created in the state treasury. Money in the account may be spent only after appropriation. Expenditures from the account may be used only for support of the common schools, and for expanding access to higher education through funding for new enrollments and financial aid, and other educational improvement efforts.

e. The Laws of 2008 §329, effective April 1, 2008, added the following sentence to RCW 83.100.230:

During the 2007-2009 fiscal biennium, monies in the account may also be transferred into the State General Fund.

The foregoing amendment to RCW 83.100.230 was not part of the budget bill known as House Bill 2687 as of January 19, 2008. (CP 175-177.)

f. The foregoing amendment to RCW 83.100.230 was added to the budget bill known as House Bill 2687 which was read the first time on February 22, 2008. (CP 179-185.)

g. The Laws of 2008 were enacted during the regular session of the Legislature which adjourned March 13, 2008. (CP 188.)

h. The Laws of 2008, Ch. 329 is entitled "Operating Budget – Supplemental Appropriations. (CP 190.)

i. The transfer of \$67,000,000 from the Education Legacy Trust Account to the State General Fund was made pursuant to "legislative authorization and direction," the Laws of 2009, Ch. 564 "Operating Budget" at § 1702. (CP 64-66.)

j. The "Operating Budget" of 2009 was effective May 19, 2009. Section 1702 directed transfers by the State Treasurer. (CP 192-197.)

k. On June 9, 2009, pursuant to the "Operating Budget"

Laws of 2009, Ch. 564, Sec. 1702, the Treasurer transferred \$67,000,000 from the Education Legacy Trust Account to the General Fund. (CP 64-66.)

l. All estate tax receipts must be transferred to the Education Legacy Trust Account pursuant to RCW 83.100.220 which has not been amended.

m. Receipts from the Estate Tax and receipts from other sources deposited into the Education Legacy Trust Account are commingled. Therefore, the funds transferred from the Education Legacy Trust Account to the General Fund on June 9, 2009 cannot be traced to a particular source. (CP 64-66.)

n. From April, 2008 through May, 2009, \$98.96 million was collected in cigarette tax revenue, \$153 million was collected in estate tax revenue, and the Education Legacy Trust Fund earned \$10.92 million from investments. (CP 103-105.)

o. The balance in the Education Legacy Trust Account on April 1, 2008 was \$292,818,936.42.

p. The balance in the Education Legacy Trust Account on May 19, 2009 was \$144,375,132.94.

q. The balance in the Education Legacy Trust Account on June 8, 2009 was \$128,833,278.36.

r. The balance in the Education Legacy Trust Account on June 9, 2009 after transfer of \$67,000,000 to State General Fund was \$61,833.825.98. (For paragraphs (o), (p), (q) and ® , see CP 199-212.)

3. ***Article VII, Section 5 of the Washington State Constitution Is Applicable.*** Article VII of the State Constitution is entitled “Revenue and Taxation.” It has been part of our State Constitution since statehood in 1889. Section 5 is entitled “Taxes, How Levied.” For Article VII, Section 5 to apply, the controversy must involve a tax. Washington Courts have discussed the definition of taxes to be "burdens or charges imposed by legislative authority on persons or property, to raise money for public purposes, or, more briefly, 'an imposition for the supply of the public treasury.'" *State ex. Rel Nettleton v. Case*, 39 Wash. 177,182, 81 P. 554 (1905).

The courts have made clear that not all demands for payment by government are taxes, but rather state that “if the primary purpose of legislation is regulation, rather than raising revenue, the legislation cannot be classified as a tax even if a burden or charge is imposed.” *Spokane v. Spokane Police Guild*, 87 Wn. 2d 457, 461 533P.2d 1316 (1976).

In the present case it is clear and uncontested that the establishment of the estate tax in 2005 was for the purpose of raising revenue to fund education through the establishment of the Education Legacy Trust. Respondents raise no objection to this claim and admit in paragraph 3.3 of their Answer that “the legislature stated in Laws of 2005, Ch. 516, § 1 an intent to provide funding for education.” (CP 329.) Because the 2005 Legislation had the purpose of raising revenue for the funding of education through the establishment of the Education Legacy Trust Account, it is a tax for purposes of Article VII, Sec. 5 of the Washington State Constitution.

4. *The State violated Article VII, Section 5 of the Washington State Constitution by diverting funds from the Education Legacy Trust Account to the State’s General Fund.* Article VII, Section 5 of the Washington State Constitution states “No tax shall be levied except in the pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.” Article VII, Section 5 is clear and unambiguous. It has been uniformly interpreted by our courts to mean (a) the law must state the object of the tax; and (b) use of the tax for any other purpose then stated in the tax legislation is forbidden.

The court first interpreted this Constitutional provision in 1897, when a law directed the Treasurer of Whatcom County to divert funds collected through taxation for building schools towards payment of a local debt. The Supreme Court declared the law to be unconstitutional. Referencing Article VII, Section 5, the Court clearly based its ruling on the fact that “this is an elementary doctrine in taxation, and without the constitutional declaration it has been held almost uniformly that there could be no diversion of monies collected by taxation for a special purpose, and placed in a fund for such purposes. *Sheldon v. Purdy*, 17 Wash. 135, 141, 49 P. 228 (1897).

In *Sheldon v. Purdy*, *supra* at p. 141, the court declared void a state statute which by its express declaration commanded the County Treasurer to pay interest coupons from monies raised by taxation for another purpose. The statutory command was declared unconstitutional under Article VII, Section 5 and therefore void. In the present action, the legislative change to RCW 83.100.230 allowing monies in the Education Legacy Trust Account to be “transferred into the state general fund,” is an unconstitutional provision and therefore void under the foregoing case.

The weight of case law supports appellants’ position. Recently, *Sheldon v. Purdy* was cited in *Sheehan v. Transit Authority*, 155 Wn.2d 790,

804, 123 P.3d 88 (2005). The court referred to the “state distinctly” requirement of Article VII, Section 5 of the Washington Constitution. The court stated that the section is directed not simply to the method of taxation but rather the relationship between the tax and the purpose of the tax, citing, *Sheldon v. Purdy, supra*. In *Sheehan*, the objects of the taxes were a regional transit system plan and the proposed Seattle Monorail. The court stated that Article VII, Section 5 would render unconstitutional actions taken “to divert taxes assessed for those purposes into some wholly unrelated project or fund.” However, in the *Sheehan* case, no such diversion had occurred and thus no constitutional violation existed. In the present action the diversion of funds from the educational purposes established for the Education Legacy Trust Account to the State General Fund is admitted.

In *State ex Rel. Bd for Vocational Educ. V. Yelle*, 199 Wash. 312, 91 P.2d 573 (1939) our court dealt with a legislative enactment appropriating funds from the current school fund for the State Board for Vocational Education. The State Board for Vocational Education presented vouchers to the State Auditor for warrants to be drawn against “the current school fund.” The Auditor determined that the funds had not been incurred for the support of the common schools. The Board sought a writ of mandamus to

compel the Auditor to draw warrants as requested upon “the current school fund.”

It was conceded that the expenses incurred by the Vocational Board were not for the support of the common schools. It was also conceded that the “common school fund” contemplated by Article IX, Sections 2 and 3 of the State Constitution could not be appropriated to any use but the support of the common schools. The court cited *Sheldon v. Purdy, supra* and other authority.

The writ of mandamus was denied. The Court stated in its decision that “to admit the proposition that revenues, once appropriated to the support of the common schools, could subsequently be diverted to other purposes, would be calamitous.” In reaching the decision, the court took language from *Collins v. Henderson*, a Kentucky case, stating “If it be once conceded that an appropriation like this may be sustained on the ground that it is in some degree beneficial to, and is, therefore, in aid of common schools, then the number and amount of such appropriations will be limited only by the discretion of the legislature, and if it so wills, the whole fund may be diverted from the purpose to which it was solemnly dedicated, or rather re-dedicated,

by the constitution, and the constitutional provision prove a mere *brutum fulmen*." *Id.* at 317 (1939).

The court clearly feared the Constitutional erosion that would occur if the legislature is able to run away with the power to raise taxes for a single purpose but divert those taxes to programs for an entirely different purpose for which the tax was raised and approved. It is clear "where money is raised and is payable out of a special fund, the fund in question shall not be called upon to pay any other or different charges, except for those which it is created." *Burbank Irr. Dist. v. Douglass*, 143 Wash. 385, 397, 255 P. 360 (1927) citing *Sheldon v. Purdy*, *supra*.

The present case is on point with the *Yelle* case and other authority presented herein. The Washington Legislature in response to the *Hemphill* decision raised and approved a "stand-alone estate-tax" in order to provide for the funding of education. This point is uncontested. RCW 83.100.230 as enacted as Ch. 514, Section 1101 of the Laws of 2005 created the Education Legacy Trust Account where "expenditures from the account may be used only for deposit into the student achievement fund and for expanding access to higher education through funding for new enrollments and financial aid and other educational improvements."

It is undisputed that the funds raised from this tax are for the singular purpose of providing for education. “Where the meaning of a provision is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Sheehan v. Transit Authority*, *supra* at p. 797 citing *Dep’t of Ecology v. Cambell & Gwinn, LLC*, 146 Wn. 2d 1, 9-10, 43 P. 3d 4 (2002). Where there is doubt in interpreting a statute that imposes a tax, “this court construes the statute strongly against the taxing body and in favor of the tax-payer.” *Puyallup v. Pac. Northwest Bell Tel. Co.*, 98 Wn. 2d 443, 448, 656 P.2d 1035(1982) citing *Vita Foods Prods, Inc. v. Seattle*, 91 Wn. 2d 132, 134, 587 P. 2d 535 (1978).

It is admitted by the respondents that twice the legislature amended RCW 83.100.230 to add that during the 2007-2009 and 2009-2011 bienniums “moneys in the account may also be transferred to the state general fund.” (CP 329-330.) It is admitted that the money in the Educational Legacy Trust Account was transferred and converted into the state general fund. Those funds were not used for the purpose of expanding access to higher education and other educational improvements, but rather for general expenditures in violation of the Constitutional provisions set forth above.

Because the defendants raise no genuine issue of material fact, in accordance with CR rule 56, the appellants were entitled to a judgment as a matter of law.

5. *The Budget Bills of 2008 and 2009 did not change the purpose or object of the Estate Tax.* The Legislation at issue in this case purportedly amending the purpose or object of the estate tax did not modify or amend the substantive law provisions of RCW Ch. 83.100. The clear stated purpose of the estate tax is to provide for educational funding. That purpose, set forth in the Laws of 2005, Ch. 516, has never changed. Similarly, neither budget bill expressly added an additional purpose to the estate tax law. (CP 179-197.)

The Laws of 2008, Ch. 329, § 924 and the Laws of 2009, Ch. 564, § 1702 are parts of legislation each denominated as "Operating Budget." The applicable sections are found toward the end of each budget bill. Each budget bill contains "appropriations" of funding. Certain appropriations in each bill contain conditions and limitations on the use of appropriated funds. Neither subsection attempts by its terms to change the purpose or object of RCW Ch. 83.100.

The 2008 budget legislation at Chapter 329 is entitled "Operating Budget – Supplemental Appropriations." The Legislation attempts to amend the substantive law of RCW 83.100.230 adding a sentence: "During the 2007-2009 fiscal biennium, monies in the account may also be transferred into the State General Fund." It should be noted that this operating budget with supplemental appropriations did not designate an amount to be transferred or appropriated to the State General Fund.

The foregoing provision is a condition or limitation attempting to modify or amend the general law (RCW Ch. 83.100) and is in direct conflict with the substantive provisions of the estate tax law. It does not limit or condition expenditure of funds transferred from the Education Legacy Trust Account to educational funding purposes. It provides for a transfer of funds from an account dedicated to educational funding to the State General Fund for unspecified purposes. As such, it is unconstitutional in violation of Article II, Section 19 of our State Constitution as well as Article VII, Section 5.

The Laws of 2009, Ch. 564, § 1702 is similarly part of the "Operating Budget." Section 1702 is a direction to the State Treasurer to transfer \$67,000,000 from the Education Legacy Trust Account to the State General

Fund "for fiscal year 2009." That law became effective on May 19, 2009.

The transfer was made on June 7, 2009.

As with the 2008 budget legislation, no statement of purpose is contained in this appropriations legislation. It does not limit or condition expenditure of funds transferred from the Education Legacy Trust Account to educational funding purposes. It is buried in budget appropriations and clearly does not attempt to alter the purpose of the estate tax. It too is unconstitutional in violation of Article II, Section 19 and Article VII, Section 5 of our State Constitution. Since the actual specific transfer of funds was authorized and done pursuant to this legislation (CP 64-66), this legislation and transfer is the unconstitutional diversion of funds challenged by appellants in this case.

6. Article II, § 19 of the Washington Constitution invalidates the purported change in purpose or "object" of the estate tax. This court's oral ruling on June 7, 2013 (CP 305-312) concluded that the Legislature could add a temporary second purpose or object of the estate tax. The issue becomes how it is possible to amend legislation as important as RCW 83.100.230 by a small provision buried in a budget and appropriations bill. Specifically, how can such legislation in a budget bill change the purpose of the estate tax

and the specific proviso of RCW 83.100.230 limiting expenditures from the Education Legacy Trust Account to educational improvement efforts.

Article II, Section 19 of the Washington Constitution states: "No bill shall embrace more than one subject, and that shall be expressed in the title." It is well established under Washington law that an appropriations bill cannot abolish or amend existing law. Any attempt to do so is a violation of Article II, Section 19 of our State Constitution.

To review what occurred here, the 2008 Washington Legislature passed engrossed Substitute House Bill 2687 which, following enactment, became Ch. 329 of the Laws of 2008. The complete title of Chapter 329 (which had over 900 sections) reads as follows:

Operating Budget – Supplemental Appropriations. An act relating to fiscal matters: amending . . . 83.100.230 . . .

Section 924 of Chapter 329 is the subject of this litigation. That section set forth the full text of RCW 83.100.230 but added at the end with underlining the simple words: "During the 2007-2009 fiscal biennium monies in the account may also be transferred into the State General Fund." This section was not in the original bill as of January 19, 2008. At that time the legislation contained 913 sections. (CP 175-177.)

The final form of Ch. 329, read for the first time on February 22, 2008, added sections including Section 924. The legislative session adjourned March 13, 2008, having enacted the Operating Budget/Supplemental Appropriations including Section 924. (CP 175-190.)

Thus, what was attempted by Section 924 is a substantive amendment to existing law contained in an appropriations bill added toward the end of the legislative session.

In *State of Washington on the relation of Washington Toll Bridge Authority v. Cliff Yelle, State Auditor*, 54 Wn.2d 545, 342 P.2d 588 (1959), the Washington State Toll Bridge Authority as plaintiff sought a writ of mandate directing the State Auditor to sign revenue bonds to finance the construction of a toll bridge across Lake Washington. The Auditor objected, contending that subparagraphs of the appropriation to the Highway Commission introduced a new subject, which the Auditor believed to be a clear violation of Article II, Section 19 providing that "no bill shall embrace more than one subject, and that shall be expressed in the title."

The court discussed first the legislative evil of engrafting upon measures of great public importance foreign matters for local or selfish purposes, pointing out that if such provisions were offered as independent

measures they would not have received support. The court went on to say at p. 551 that "appropriation bills would be peculiarly vulnerable to this legislative evil," quoting the 1915 case of *Blakeslee v. Clausen*, 85 Wash. 260, 148 Pac. 28 (1915):

An appropriation bill is not a law in its ordinary sense. It is not a rule of action. It has no moral or divine sanction. It defines no rights and punishes no wrongs. It is purely *lex scripta*. It is a means only to the enforcement of law, the maintenance of good order, and the life of the state government. Such bills pertain only to the administrative functions of government.

The title of the act in question, as in the present case, made reference only to budget and appropriations for miscellaneous purposes. As such, the introduction of a second subject in the same bill not covered by the title resulted in a double violation of Article II, Section 19.

An identical issue is presented in the case before this court. The 2008 budget bill cannot change the purpose of the estate tax which is a new subject, and, which is not expressed in the title of the bill.

In *Flanders v. Morris*, 88 Wn.2d 183, 558 P.2d 769 (1977) the petitioner was a 28-year old unemployed individual who sought public assistance under the Washington statutes, contending that a bill passed by the Legislature (a section of an appropriations bill) that limited public assistance eligibility to single persons over 50 years of age was unconstitutional. The

court agreed, issuing the writ and directing the Department of Social & Health Services to pay the petitioner the public assistance to which he was entitled. Concerning the legislation and the appropriations bill that attempted to change the law, the court stated at p. 190:

Appropriations bills exist simply for the purpose of implementing general laws. As such, we hold that the general law cannot be suspended by provisions in appropriations bills which are in conflict.

In the opinion, the court quoted from a governor's letter reading as follows:

I take this opportunity also to point out my concern over the recent trend by legislative drafters of incorporating substantive legislation into budget bills . . . I believe that provisions such as these involve policy considerations that should be dealt with by the Legislature in separate bills, rather than inserting them into budget bills where substantive changes in policy will not receive adequate study and consideration and where they tend to create confusion for the appropriation provisions of the budget bill. . . I strongly urge the Legislature to put an end to this kind of drafting.

The court at p. 186 expressed concern that a law which could not pass on its own merit, under a proper title, could become law by being "slipped into a 45-page appropriations bill." In addition to the problem of notice to legislators, there is an additional problem that even if legislators have notice,

they would be "somewhat constrained to reject a single provision" in an appropriations bill.

Article II, Section 19 has a dual purpose to prevent "log rolling," or pushing legislation through by attaching it to other necessary or desirable legislation. Secondly, the members of the Legislature and the public should become generally aware of what is contained in proposed new laws.

Citing *Yelle, supra*, the court at p. 188 pointed out that an appropriations bill "defines no rights" and cannot abolish or amend existing law. The proper legislative procedure is to enact separate, independent, properly titled legislation.

At p. 190, the court held that "the general law cannot be suspended by provisions in appropriations bills which are in conflict." In the action before this court, the 2-year time limit for transfer of funds from the Education Legacy Trust Account to the General Fund attempts to "suspend" the purpose of the estate tax as expressed in RCW 83.100.230. The *Flanders* holding is that general law cannot be suspended by provisions in appropriations bills which are in conflict with the general law.

In *The Washington State Legislature v. State of Washington*, 139 Wn.2d 129, 95 P.2d 353 (1999), the following appears at p. 145:

When the Legislature places a proviso in an appropriations section not containing a specific dollar amount, it may do so at the peril of having the proviso invalidated. Such a proviso often has all the characteristics of substantive legislation. *We have repeatedly indicated the Legislature may not abolish or adopt substantive law in an appropriations bill.* (Emphasis supplied.)

In numerous prior decisions, we have construed Article II, Section 19 to forbid inclusion of substantive law in appropriation bills. Washington Constitution Article II, Section 19 states: 'No bill shall embrace more than one subject, and that shall be expressed in the title.' Such an action violates the constitutional directive of Article II, Section 19 because a budget bill, by its nature, appropriates funds for a finite time period – two years – while substantive law establishes public policy on a more durable basis. In effect, a budget appropriates the funds necessary to implement general laws.

See also *Inland Boatman's Union of the Pacific v. Dept. of Transportation*, 119 Wn.2d 697, 836 P.2d 823 (1992) where the following appears at p. 710:

. . . as we have repeatedly made clear, an appropriations bill cannot abolish or amend existing law.

If Ch. 329 of the Laws of 2008 allowing transfer of estate tax revenues into the State General Fund was consistent with the existing purpose and object of the estate tax, no substantive law change could be alleged. However, the respondents must adhere to a position that this legislation changed the purpose or object of the estate tax as enacted in 2005.

The 2008 amendment is merely an appropriation of an unspecified sum from a dedicated fund. It was not an attempt to change the purpose or object of the estate tax. If it was, that substantive law change violates Article II, Section 19 of our State Constitution.

7. *The "state distinctly" requirement of Article VII, Section 5.*

An additional problem for defendants in attempting to characterize Chapter 329 of the Laws of 2008 as amending the purpose or object of the estate tax is the "state distinctly" requirement of Article VII, Section 5 of the Washington Constitution.

It is well established under Washington law that the "state distinctly" requirement of Article VII, Section 5 of the Washington Constitution is directed to "the relationship between the tax and the purpose of the tax." See *Sheehan v. Central Puget So. Transit Authority*, 155 Wn.2d 790, 804, 123 P.3d 88 (2005) citing *Shelton v. Purdy*, 17 Wash. 135, 141, 49 Pac. 228 (1897).

Article VII of our State Constitution at Section 5 states: "No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied."

The "state distinctly" and "to which only it shall be applied" requirements must be given meaning in the context of the issue now before the court. It cannot be seriously argued that the 2008 legislation amended the object of the estate tax by stating distinctly the new object to which only it should be applied. At best, the 2008 legislation is no different than the facts in *Sheldon v. Purdy*, 17 Wash. 135, 141, 49 Pac. 228 (1897), which declared void and unconstitutional a state statute diverting monies collected for a special purpose and placed in a fund created for that purpose. Similarly, the 2008 legislation specifies no dollar amount but as in *Sheldon*, allows a new use of dedicated funds contrary to the enacted tax legislation. Washington law does not allow such a practice under Article VII, Section 5 of the State Constitution.

8. *Article VII, Section 5 of the Washington State Constitution is an "elementary doctrine in taxation" applied in other jurisdictions.*

Plaintiffs have previously addressed at length the well-established law of this State that Article VII, Section 5 of our State Constitution renders unconstitutional and void any state statute diverting "moneys collected by taxation for a special purpose, and placed in a fund created for such purpose." *Sheldon v. Purdy, supra*

In *Sheldon* a county treasurer had money in two funds benefiting schools. One fund held state and local tax monies for general school purposes. The other fund was held for payment of current expenses of the school district. A state statute was enacted which allowed for payment of interest on school bonds from *any* funds belonging to the school district. The state law was declared unconstitutional and void to the extent it commanded the county treasurer to pay interest coupons on bonds from monies raised by taxation for another purpose. The court, at p. 141 described Article VII, Section 5 of our State Constitution as "an elementary doctrine in taxation."

Several states have constitutional provisions which are identical to Article VII, Section 5. Those jurisdictions apply a similar interpretation of this constitutional prohibition. Specifically, attempts to appropriate dedicated tax revenues from a stated purpose have been held unconstitutional.

In a case presenting issues strikingly similar to the issues before this court, the Supreme Court of South Carolina in *State, ex rel Edwards v. Osborne*, 195 S.C. 295, 11 S.E.2d 260 (1940) (CP 215-226) struck down an attempted legislative diversion of tax dollars dedicated to a specific purpose. The South Carolina Constitution in Article X, Section 3, provides that a

statute that levies a tax "shall distinctly state the object of the same; to which object the tax shall be applied."¹

South Carolina had a gasoline tax directing funds be turned over to the State Highway Department for the maintenance of all highways. The challenged legislation attempted to amend this purpose by adding an additional purpose to the tax levy, to-wit, to pay the deficit and general expenses of the State. In declaring the appropriation statute unconstitutional, the court, at p. 314 quoted from an earlier South Carolina opinion as follows:

. . . If it had been intended that the Legislature should have any discretion as to the objects to which such funds should be applied, this clause would not have been inserted in the Constitution. Its insertion evidences the intent of the Constitution to deprive the legislature of all power of misapplication, by an authoritative and imperative appropriation to the specific objects set forth in the tax law as the ground of raising the specific tax. If the construction of the constitutional provision stopped short of this, it might entirely defeat the intent, for money might be raised by the Legislature under an act strictly conformable to the Constitution as a mere pretext, and, afterwards, applied to any purpose desired by the Legislature.

North Dakota has a constitutional provision identical to Article VII,

¹ In 1976 South Carolina amended the applicable constitutional provision. In *Myers v. Patterson*, 433 S.E.2d 841 (1993) the court approved diversion of tax revenues to the State's General Fund from a specially created separate fund based on the constitutional amendment. As explained in the opinion, the court did not overrule prior decisions based on the former constitutional provision.

Section 5. In *Brye v. Dale*, 64 N.D. 41, 250 N.W. 99 (1933) (CP 227-231), the court invalidated legislation attempting to divert funds from a hail tax fund. The challenged legislation transferred hail tax funds into a real estate bond interest payment fund. The court held that the hail tax was a constitutional tax appropriated for a specific purpose and could be used in no other way. Any appropriation or loaning of the fund for any other purpose violated the State Constitution.

In the opinion, the court at pp. 46-48 referred to similar constitutional limitations in the states of Kansas, Kentucky, Michigan, Missouri, New York, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Washington and Wyoming.

Additionally, the *Brye* opinion quotes from *Opinion of Judges*, 59 S.D. 469, 240 N.W. 600, quoting as follows:

Secondly, and with particular reference to the possibility of employing moneys (either state or county) now on hand or to accrue under present levies, for the furnishing of feed or making of feed loans, article 11, § 8, Constitution of this state, provides: 'No tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same, to which the tax only shall be applied.' Under this section we are of the opinion that moneys now on hand (or hereafter to be received) as the result of payment of taxes (whether motor vehicle, fuel tax or other tax) already levied, and the proceeds of which have already been appropriated must be applied to the purposes for which they were levied and to which they

have already been appropriated, and we think the same could not now be diverted, even by legislative action, to any other purpose.

Based on the foregoing opinion, any legislative action attempting to redirect or change the purpose of the tax would be unconstitutional. This includes moneys now on hand or hereafter received as a result of payment of taxes. As in the case before this court, the purpose of the estate tax was set forth at its enactment and the appropriation already designated to education funding only. In fact, the object and appropriation of estate tax proceeds was made clear by establishment of the Education Legacy Trust Account. It was this "trust" account established in the initial estate tax legislation in 2005 that identified a repository for all estate tax proceeds. The diversion of \$67 million in 2009 to the state general fund for no specific purpose clearly violates and renders meaningless the language of Article VII, Section 5 requiring the object of the tax to be distinctly stated "to which only it shall be applied."

Other states have allowed a limited exception to this doctrine, not applicable here, where the purpose of the tax has been fully attained. In *Sathre v. Hopton*, 66 N.D. 313, 265 N.W. 395 (1936) (CP 232-246), the court, at p. 327-328 stated:

The idea that the moneys resulting from a tax must be applied to the purpose for which the tax was imposed implies that that purpose has not been attained; that the proceeds of the tax are needed to accomplish such purpose, and that they actually can be applied thereto. So where the purpose or object for which the tax was imposed has actually or potentially been attained or satisfied, and there remains a surplus which is not needed for the accomplishment of the purpose for which the tax was imposed, then the lawmakers are not inhibited by section 175 of the Constitution from appropriating such surplus to some proper public purpose. *Field v. Stroube*, 103 Ky. 114, 44 S.W. 363; *Whaley v. Com.*, 110 Ky. 154, 61 S.W. 35; *Auditor Gen. V. State Treasurer*, 45 Mich. 161, 7 N.W. 716; *State ex rel. Jackson v. Butler County*, 77 Kan. 527, 94 P. 1004; *Howard v. Huron*, 6 S.D. 180, 195, 60 N.W. 803, 26 L.R.A. 498. See also *Miller v. Merriam*, 94 Iowa, 126, 62 N.W. 689; *Goer v. Taylor*, 51 N.D. 792, 200 N.W. 898, *Boettcher v. McDowell*, 43 N.D. 178, 174 N.W. 759.

9. ***State of Washington refused to take action to correct the unconstitutional diversion of funds.*** This case is an action against the State of Washington Department of Revenue, the State Treasurer and State Auditor in the nature of an injunction or mandamus. The First Amended Complaint for Declaratory and Injunctive Relief to Restrain Unconstitutional Expenditures of Public Funds and for a Decree Restoring the Funds Expended (CP 14-25) seeks a decree to restore funds to the Education Legacy Trust Account and a mandatory injunction enjoining further diversion of funds collected under the Washington Estate Tax, RCW Ch. 83.100.

The acts alleged in the Amended Complaint were not challenged by officials or agencies of the State of Washington notwithstanding the request of appellants' counsel. Formal written demand was made upon respondent State officials and the Washington State Attorney General for the relief requested in the Amended Complaint. (CP 14, 21.) Counsel requested that respondents bring an action to recover misappropriated funds as alleged in the Amended Complaint. The State Attorney General's Office responded in writing that no adequate reason had been provided for the institution of the requested legal action. (CP 25.) It became necessary for appellants to bring this action to vindicate their legal rights and the legal rights of others by challenging the unlawful expenditure of public funds made pursuant to patently unconstitutional legislative and administrative actions.

F. CONCLUSION

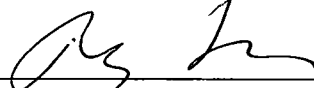
The Legislature persists in undermining public education funding to the extent of diverting dedicated tax funds from their intended purpose. If in fact the Education Legacy Trust Account is a "trust" fund for the benefit of public education, the Legislature and defendant State officers have breached the trust established in the 2005 enactment of the estate tax.

Appellants respectfully request this court reverse the trial court summary judgment ruling and grant appellants' Motion for Summary Judgment on all issues. The State of Washington should be directed to forthwith return \$67 million plus interest to the Education Legacy Trust Account to be utilized for educational purposes only consistent with the stated object of the estate tax codified as RCW Ch. 83.100.

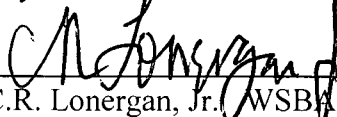
Respectfully submitted this 14th day of April, 2014.



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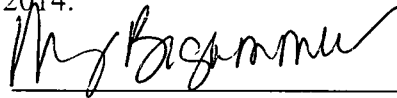
Declaration of Service

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date I sent by U.S. Mail, first class, postage prepaid and also electronic mail, a true copy of this document to:

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JoshuaW@ATG.WA.GOV

Dated this 14th day of April, 2014.

A handwritten signature in black ink, appearing to read "Mary Berghammer", written over a horizontal line.

Mary Berghammer